RECORD AND BRIEFS

FILED
FEB 15 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-54

IN THE

Supreme Court of the United States

JUAN ESQUIVEL-QUINTANA,

Petitioner,

v.

JEFFERSON B. SESSIONS, III,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The federal government and all states, including California, have statutes prohibiting adults from having sex with persons under 16 years old or younger teenagers. *See, e.g.*, Cal. Penal Code § 261.5(d).[1] But a handful of states have *additional* statutes, such as Cal. Penal Code § 261.5(c), making it a crime for a 21-year-old to have consensual sex with a person who is almost 18. The question presented is whether a conviction under one of these outlier statutes constitutes the "aggravated felony" of "sexual abuse of a minor."

All signs point to no. The federal statute criminalizing "sexual abuse of a minor," the Model Penal Code, and the vast majority of states do not deem the least culpable conduct under Cal. Penal Code § 261.5(c) to be illegal, much less a serious felony. Six of the seven states that do criminalize that conduct do not treat it as "abuse." And the ordinary understanding of sexual "abuse" does not encompass consensual sex between two partners who are 21 and almost 18.

The Government asks this Court to ignore all these signals of statutory meaning in favor of an

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[1] *See also* Resp. Br. 4a-9a; Petr. Br. 34 & n.9; Colo. Rev. Stat. § 18-3-402(1)(d); Del. Code Ann. tit. 11, § 771(a)(1); Fla. Stat. § 800.04(4)(a); 720 Ill. Comp. Stat. 5/11-1.40(a)(1); La. Stat. Ann. § 14:42(A)(4); Mo. Rev. Stat. § 566.067; N.Y. Penal Law §§ 130.30(1), 130.45(1); Tenn. Code Ann. §§ 39-13-522, -506(b)(1); Tex. Penal Code § 22.021; Utah Code Ann. §§ 76-5-401.1, -402.1; Wyo. Stat. § 6-2-314(a)(i).

expansive definition of "sexual abuse of a minor" stitched together from *Black's Law Dictionary*. This Court should refuse that request. The federal statute criminalizing "sexual abuse of a minor"—which Congress amended simultaneously with enacting the identically worded INA provision here, and which prohibits consensual sex only when the younger partner is under 16—is plainly more instructive than *Black's Law Dictionary*. And when the INA designates an aggravated felony without providing a readily apparent federal definition, surveying criminal law provides a reliable method of discerning the parameters of the generic offense Congress had in mind. This is so even when state laws are not entirely uniform and regardless of whether the crime has common-law roots.

At any rate, the Government's proposed definition gets it nowhere. According to the Government, the phrase "sexual abuse of a minor" encompasses any "sexual activity" with a minor that a jurisdiction deems "illegal." Resp. Br. 17. But consensual "sexual activity" is not the same thing as "sexual *abuse*." Consensual sex constitutes "abuse" solely because of the partners' ages only when the younger partner is under 16. And the word "illegal" cannot bridge the gap between "activity" and "abuse." A generic crime "must have some uniform definition" that does not fluctuate according to what each jurisdiction happens to prohibit. *Taylor v. United States*, 495 U.S. 575, 592 (1990).

Nor is there any basis for deferring to the BIA's construction of 8 U.S.C. § 1101(a)(43)(A). This Court's precedent does not require—or even allow—considering the BIA's views before applying

traditional canons of statutory construction. One such canon is the rule that ambiguities in deportation laws must be construed against the Government. More fundamentally, *Chevron* deference may not eclipse the rule of lenity where, as here, a statute has criminal applications. And even if the statute were ambiguous within the meaning of *Chevron*, it still would not matter. The BIA's analysis is unreasonable in multiple ways the Government hardly defends.

In short, whatever path this Court follows, all roads lead to reversal.

ARGUMENT

I. This Court May Decide This Case by Asking Solely Whether Cal. Penal Code § 261.5(c) Contains an Element That Is Broader Than the Generic Definition of "Sexual Abuse of a Minor."

The BIA and the Sixth Circuit set out here to determine only whether the age-related components of Cal. Penal Code § 261.5(c) are broader than the generic crime "sexual abuse of a minor." Pet. App. 12a-15a, 40a; *see also United States v. Rangel-Castaneda*, 709 F.3d 373, 381 (4th Cir. 2013) (Wilkinson, J.) ("[R]ather than set out what 'sexual abuse of a minor' *can* mean, we simply note one particular thing that it *cannot* mean."). The Government endorsed the same approach below. It disclaimed any need to make "findings on issues the decision of which is unnecessary to the result[]" in favor of fleshing out the meaning of "sexual abuse of a minor" through a "case-by-case methodology." Resp. CA6 Br. 24-26 (citation omitted).

The Government now takes the opposite view. It criticizes petitioner for declining to provide a

comprehensive definition of "sexual abuse of a minor." Resp. Br. 23. The Government also maintains the age-related elements of the generic crime here must be established in a vacuum, before considering how these elements relate to the least culpable acts criminalized under the state statute of conviction. *Id.* 25. The Government is wrong on both counts.

1. It is perfectly acceptable to construe only those elements of a generic crime that are necessary to a case's disposition. In *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), for instance, the Court considered whether a state-law conviction was one "relating to a controlled substance" under the INA. Because the state statute covered drugs not classified under federal law as "controlled substances," the Court held the state statute was overbroad—leaving undecided what exactly it would mean for a crime to "relate to" a controlled substance. *Id.* at 1991.

Indeed, despite its rhetoric, the Government itself offers only a partial definition of "sexual abuse of a minor." The Government does not tackle whether the crime requires the defendant to *knowingly* commit the proscribed conduct. *See Rangel-Perez v. Lynch*, 816 F.3d 591, 604-05 (10th Cir. 2016) (holding such *mens rea* is required). Nor does the Government say whether "sexual abuse of a minor" requires physical contact. *See In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995-96 (B.I.A. 1999) (holding by bare majority that contact is not required).

Incrementalism is as it should be. As with other legal methodologies, the categorical approach does not require this Court to decide potentially difficult issues the parties do not contest and that do not bear on a case's outcome. Once this Court concludes a

state statute has an element that is broader than the relevant generic crime, it may cease its analysis.

2. When assessing whether a state statute has an element that is broader than its generic counterpart, it is likewise permissible to find overbreadth without fully defining the decisive element of the generic crime. The key question, after all, is how the state statute "compare[s]" to the generic crime. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). As this Court has explained, it "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, *and then* determine whether even those facts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (emphasis added) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)); *see also, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (courts should "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime]"). There is nothing wrong with taking a minimalist approach to this inquiry.

Leocal v. Ashcroft, 543 U.S. 1 (2004), illustrates the point. This Court held there that a state statute must require a "higher degree of intent than negligent or merely accidental conduct" to fall within the definition of a "crime of violence" under the INA. *Id.* at 9-11. Because the state DUI law at issue did not require even that low level of *mens rea*, the Court expressly declined to decide whether "*reckless* use of force" is enough. *Id.* at 13.

As should be apparent by now, decisions like *Leocal* do not improperly "conflate[] the distinct steps of the categorical approach," Resp. Br. 25. Such

limited rulings simply conserve judicial resources by leaving hard problems concerning the outer boundaries of generic crimes for future cases, where those boundaries can be litigated on concrete records by parties with direct stakes in the outcomes. This Court, of course, is always free to decide more than is necessary to resolve a case. But the categorical approach does not require it.[2]

II. Cal. Penal Code § 261.5(c) Is Broader Than the Generic Crime of "Sexual Abuse of a Minor."

The Government does not dispute that the least culpable conduct under Cal. Penal Code § 261.5(c)—consensual sex between someone who just turned 21 and someone who is almost 18—is legal under the federal statute prohibiting "sexual abuse of a minor," the Model Penal Code, and the vast majority of state criminal codes.[3] But the Government argues (A) that the nationwide consensus that the conduct here does not constitute "statutory rape" tells us nothing about when consensual sex constitutes "sexual abuse of a

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[2] Another example underscores the folly of the Government's position. Imagine a state prohibited conduct under a nondivisible forgery statute that no other state criminalized. Under the Government's approach, a court would have to pin down all of the elements of generic forgery to decide the case, even though it would be perfectly obvious that convictions under the state statute would not qualify regardless of what those elements might be. There is no reason to require that academic exercise.

[3] The Government notes that two states that do not criminalize the least culpable conduct now did so in 1996. Resp. Br. 29 n.37. But there is no meaningful difference between a consensus of 41 states and one of 43 states.

minor" and (B) that other indicia of congressional intent suggest that the conduct Cal. Penal Code § 261.5(c) prohibits categorically falls within Section 1101(a)(43)(A). Both arguments are mistaken.

A. Multi-Jurisdictional Analysis

When multi-jurisdictional surveys have supported the Government's interpretation of one of the INA's "aggravated felony" provisions, the Government has maintained that such surveys provide the best window into Congress's understanding of generic crimes. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), for example, the Government "presented [this Court] with a comprehensive account of the law of all States and federal jurisdictions" and urged this Court to construe the INA consistent with that consensus. *Id.* at 190. The BIA regularly consults multi-jurisdictional surveys as well. Indeed, just two months ago, the BIA held that "[b]ecause the majority of States, the Model Penal Code, and the Federal statute included the foregoing elements in their definition of perjury when Congress enacted section 101(a)(43)(S) of the Act, . . . this definition also embodies the level of criminal liability that Congress intended when it added the offense of perjury to the Act in 1996." *In re Alvarado*, 26 I. & N. Dec. 895, 901 (B.I.A. 2016).

Faced here, however, with a multi-jurisdictional survey that dictates a narrower reading of the INA than it would prefer, the Government contends for various reasons that a multi-jurisdictional survey sheds no light on the meaning of "sexual abuse of a minor." The Government is incorrect.

1. The Government first argues that a multi-jurisdictional analysis is irrelevant because laws regulating "statutory rape"—the type of "sexual abuse" at stake here—"vary considerably in their particulars." Resp. Br. 18. This is a strange argument. The whole purpose of a multi-jurisdictional analysis is to derive a "uniform definition" when there is no readily apparent federal definition and states define a crime in "many different ways." *Taylor v. United States*, 495 U.S. 575, 580, 592 (1990). Accordingly, this Court has repeatedly held that multi-jurisdictional surveys control where, as here, jurisdictions have divergent definitions of the crime at issue but a consensus can be discerned regarding the particular elements at issue. *See* Petr. Br. 15-17, 23-24 (discussing cases).

Contrary to the Government's suggestion, this does not mean that a state statute falls within a generic offense only if it constitutes the "lowest common denominator" of state offenses, Resp. Br. 26. The task is simply to determine whether the state statute of conviction "criminalizes conduct that *most* other States would not consider" illegal under their comparable statutes. *Duenas-Alvarez*, 549 U.S. at 191 (emphasis added); *see also Taylor*, 495 U.S. at 598 (courts should evaluate how the crime is defined "in the criminal codes of *most* States" (emphasis added)). Here, 43 states treat the least culpable acts criminalized under Cal. Penal Code § 261.5(c) as legal. *See* Pet. App. 66a-67a. And 32 states—along with federal law and the Model Penal Code—set the age of consent in their statutory rape laws at 16, *Rangel-Castaneda*, 709 F.3d at 377-78. This "large majority" is "too extensive to reject." *Id.* at 379-80.

2. The Government next contends that the multi-jurisdictional consensus here does not illuminate the meaning of Section 1101(a)(43)(A) because the crime "sexual abuse of a minor" does not have "common law roots." Resp. Br. 15, 23-24. This argument rests on a faulty premise. When Congress criminalized "sexual abuse of a minor" in 18 U.S.C. § 2243, it explained that the statute codified the "common law" offense of "statutory rape." H.R. Rep. No. 99-594, at 7 (1986); *see also* Wayne R. LaFave, *Criminal Law* § 17.4(c), at 920 (5th ed. 2010) ("statutory rape" is "encompassed within the common law of the United States").

At any rate, there is nothing magical about common-law roots. A multi-jurisdictional survey is designed to discern the "generally accepted *contemporary* meaning" of a crime—on the theory that this definition best approximates what Congress had in mind when making it a predicate for deportation or a sentencing enhancement. *Taylor*, 495 U.S. at 596-98 (emphasis added). It makes no difference, when discerning the "generally accepted contemporary meaning" of a crime, whether that crime has common-law roots. All that matters is whether it is possible—as it is here with respect to statutory rape—to identify a nationwide consensus regarding the pertinent elements of the offense.

Were the relevance of multi-jurisdictional surveys limited to crimes with common-law roots, serious practical problems would arise. The INA references several offenses that were not crimes at common law. To name a few: "failure to appear by a defendant for service of sentence"; "trafficking in vehicles the identification numbers of which have been altered"; and "child abuse." 8 U.S.C.

§ 1101(a)(43)(Q), (R); *id.* § 1227(a)(2)(E)(i). Courts have productively used multi-jurisdictional surveys to construe such provisions, noting that the designated crimes have "existed long enough to have 'accumulated' legal tradition and certain 'cluster[s] of ideas.'" *Ibarra v. Holder*, 736 F.3d 903, 914 (10th Cir. 2013) (alteration in original) (citation omitted) (construing "child abuse"). If this approach were no longer appropriate, courts would lack meaningful guideposts or constraints. And it would be difficult for lawyers or anyone else to predict the definitions of generic crimes or even what sources might be relevant to figuring them out. *See* Petr. Br. 26-29.

The Government protests that "this Court has often resolved categorical-approach cases"—"particularly where the federal provision at issue does not use a common law term"—without consulting multi-jurisdictional analyses. Resp. Br. 24. But none of the cases the Government cites involved construing a generic crime. Rather, four of the five cases concerned crimes defined by cross-reference. *See Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Lopez v. Gonzales* 549 U.S. 47 (2006); *Leocal*, 543 U.S. 1.[4] The remaining case involved language referring to the circumstances under which a given crime might be committed (whether it involved the

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[4] In *Carachuri-Rosendo* and *Lopez*, the Court consulted words ("illicit trafficking") outside of the cross-reference but only to verify the Court's construction of the cross-reference—much like how the Court has double-checked its analysis in other cases against the commonsense meaning of the umbrella term "aggravated felony." *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1689.

use of "physical force"), not a particular generic crime itself. *See Johnson*, 559 U.S. at 135 (quoting 18 U.S.C. § 924(e)(2)(B)(i)). Multi-jurisdictional surveys would serve no useful purpose in those contexts.

3. Finally, the Government claims that using multi-jurisdictional analyses can be too "difficult and burdensome." Resp. Br. 28. Yet the Government does not dispute that multi-jurisdictional surveys are readily available from a variety of sources. *See* Petr. Br. 26. For rare cases where they are not, the Government acts as though "immigration judges" and "courts" must conduct analyses on their own. Resp. Br. 30. Not so. As the party seeking deportation, the Government should—and has repeatedly shown it can—conduct the pertinent analyses itself. *See, e.g.*, *Duenas-Alvarez*, 549 U.S. at 190.

The Government similarly suggests that consulting a multi-jurisdictional analysis as petitioner urges here "would require a new 50-State survey for each state offense." Resp. Br. 28. This suggestion is also mistaken. Holding that convictions under Cal. Penal Code § 261.5(c) do not constitute "sexual abuse of a minor" would make clear that convictions under the six other state laws proscribing the same conduct are also excluded from the INA's reach. Or, if this Court prefers, it could hold, as the Fourth Circuit has, that the consensus under federal and state law that the age of consent for purposes of statutory rape is 16 excludes all other such laws with higher cutoffs. *Rangel-Castaneda*, 709 F.3d at 377-78. Either way, the multi-jurisdictional survey here enables this Court not only to resolve this case but also to provide meaningful guidance with respect to other state laws.

B. Other Interpretive Tools

The Government maintained for years that Section 1101(a)(43)(A) is "ambiguous." *See, e.g.*, Resp. CA6 Br. 15-16; Br. in Opp. 10, *Velasco-Giron v. Holder*, 135 S. Ct. 2072 (2015) (No. 14-745). It now contends, however, that the "plain language" of the statute has a meaning never previously discerned by any litigant or court in the two decades the subsection has been on the books. According to the Government, the crime "sexual abuse of a minor" encompasses all conduct "that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." Resp. Br. 15, 17. Even if the Government were correct that the meaning of "sexual abuse of a minor" turned on nothing more than the text and structure of the INA, the Government's proposed definition still would miss the mark.

1. The Government's proposal to cover all illegal sexual "activity" involving persons under 18 fails to account for the key statutory term in this case: "abuse." As petitioner has noted, consensual sex between a 21-year-old and someone just shy of 18 is not typically thought of as sexual "abuse." Petr. Br. 30. Indeed, only *one* state characterizes it as such. *Id.* 21.

The Government responds, citing *Taylor*, that it does not matter how states "label" the conduct at issue. Resp. Br. 30. But this is not a case, like *Taylor*, where certain jurisdictions simply use different nomenclature. *See Taylor*, 495 U.S. at 591. California and the other jurisdictions criminalizing the conduct at issue *do* use the term "sexual abuse." But they reserve the term for sexual acts involving children

under 16 (or where offenders hold positions of authority over victims). *See* Petr. Br. 20-21, 30-31.

Black's Law Dictionary—the primary source the Government uses to formulate its definition of "sexual abuse of a minor"—is not to the contrary. The Government notes that *Black's* defines "sexual abuse" to include "[i]llegal sex acts performed against a minor" and the word "minor" as someone under 18. Resp. Br. 16 (citing *Black's Law Dictionary* 997, 1375 (6th ed. 1990)). But this still leaves unresolved what the word "illegal" means in the context of consensual sex. That question turns on the prevailing "age of consent." *Black's* did not define that term in the edition the Government cites, but it now clarifies that the term "usually" means "16 years." *Black's Law Dictionary* 73 (10th ed. 2014).

2. Insofar as the Government intends the word "illegal" in its proposed definition to turn here not on the *typical* age of consent but instead on the designated age in the state (or foreign country) where the conviction occurred, then its proposed definition would be unacceptable for another reason. It would flout the categorical approach's basic precept that a generic offense must "have some uniform definition" that does not "depend on the definition adopted by the State of conviction." *Taylor*, 495 U.S. at 590, 592.

What is more, using the word "illegal" to define Section 1101(a)(43)(A)'s coverage would sweep in conduct that even the states with the most expansive conceptions of statutory rape deem mere misdemeanors. For instance, two states consider it a misdemeanor for two 17-year-olds to have consensual sex. *See* Cal. Penal Code § 261.5(b); Wis. Stat. §§ 948.01(1), 948.09; *see also In re Interest of J.F.K.*,

No. 2016AP941, 2016 WL 7471603 (Wis. Ct. App. Dec. 28, 2016). Applying the word "illegal" literally would deem such minor offenses "aggravated felonies." Yet this is exactly the kind of counterintuitive construction of "aggravated felony" this Court has deemed "fundamental[ly] flaw[ed]." *Moncrieffe*, 133 S. Ct. at 1689; *see also* Petr. Br. 32-33 (elaborating on this point).

The Government counters that the INA designates some offenses as aggravated felonies that, measured against murder and rape, are "comparatively minor." Resp. Br. 35 (quotation marks and citation omitted). But that does not respond to this Court's admonition that "the English language tells us not to expect" conduct to be classified as an "aggravated felony" that is *legal* under federal law and the vast majority of state criminal codes—and is a *misdemeanor* the two states that bother to prohibit it. *Carachuri-Resendo*, 560 U.S. at 575.

Even as to the comparison to "murder and rape," the Government's argument lacks force. The generic crime "sexual abuse of a minor" is listed *in the same subsection* as those offenses. *See* 8 U.S.C. § 1101(a)(43)(A). Therefore, noting that crimes referenced in *other subsections* are "comparatively minor" does not dispel the inference that Congress must have thought "sexual abuse of a minor" covered quite egregious conduct to warrant placing it in a triplet with murder and rape. Petr. Br. 31-32.

3. The Government's new definition of "sexual abuse of a minor" also fails to come to grips with 18 U.S.C. §§ 2243(a) and 2241(c), which together criminalize what Congress called "sexual abuse of a minor" at the time it enacted Section 1101(a)(43)(A).

See Petr. Br. 19. If this Court felt the need to offer a comprehensive, "plain language" definition of the term "sexual abuse of a minor," these provisions—not the Government's proposal—would provide the most sensible definition. *See id.* 18 n.3; Amicus Br. of Immigrant Defense Project et al. 4-18.

The Government persuaded the Sixth Circuit (and initially told this Court) that Section 2243(a) could not inform the meaning of Section 1101(a)(43)(A) because Section 2243 currently does not cover sexual acts against children under 12. *See* Pet. App. 13a; Resp. CA6 Br. 17-18; BIO 14. But the Government has now abandoned that argument, recognizing that Section 2243 encompassed such conduct when "sexual abuse of a minor" was added to the INA in 1996 and Section 2241(c) continues to do so today. Petr. Br. 19.

That leaves the Government with two objections to construing Section 1101(a)(43)(A) consistent with the identical phrase in Section 2243. First, the Government argues that "sexual abuse of a minor" is merely the "title" of Section 2243. Resp. Br. 33-34. But it has been established since this Court's earliest days that titles give "aid in showing what was in the mind of the legislature." *Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818)). And just last Term, this Court treated "sexual abuse of a minor" and other headings in the chapter of the U.S. Code covering sexual-abuse offenses as relevant to interpreting other substantive provisions in the U.S. Code using the same language. *See Lockhart v. United States*, 136 S. Ct. 958, 964 (2016).

Second, the Government notes that Section 1101(a)(43)(A) does not explicitly "cross-reference" Section 2243. Resp. Br. 16. But this is not controlling. The default presumption is that when, as here, Congress uses "identical words" in different parts of the same legislation, it intends those words to mean the same thing in both places. Petr. Br. 18-19 (citing cases). The BIA, in fact, has held that the provision designating "obstruction of justice" takes its meaning from how that "term of art [is] utilized in the United States Code," even though the pertinent criminal provision was not enacted in the same legislation. *See In re Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 893 (B.I.A. 1999).

The Government nevertheless insists that the INA does not cross-reference Section 2243 because Congress wanted to cover types of illegal sexual acts involving minors beyond the conduct criminalized by Sections 2243(a) and 2241(c). Resp. Br. 35. But the INA bespeaks no such intent. To the contrary, the statute designates other types of sexual conduct toward minors—specifically, "child pornography" and "trafficking in persons"—as separate aggravated felonies. 8 U.S.C. § 1101(a)(43)(I), (K). And still other sexual acts against children can constitute "child abuse" or "crimes of moral turpitude" that likewise subject offenders to deportation. *See* Petr. Br. 34-35.

But even if Section 1101(a)(43)(A)'s words "sexual abuse of a minor" encompass conduct beyond the statutory-rape-type offenses covered by Sections 2243(a) and 2241(c), there is no reason to believe Congress would have wished the INA's coverage of *that category* of offenses to extend beyond the prohibitions in Sections 2243(a) and 2241(c). Under a

"plain language" approach, Congress's coverage of a particular crime in the INA should be presumed to refer to the identically worded crime in the federal criminal code absent strong evidence to the contrary. No such evidence exists here.

III. The BIA's Interpretation of "Sexual Abuse of a Minor" Is Not Entitled to *Chevron* Deference.

The Government tries to have it both ways with respect to the BIA. Despite urging the Court to adopt a definition of "sexual abuse of a minor" that diverges from BIA precedent, the Government urges deference to the BIA's holding that a conviction under Cal. Penal Code § 261.5(c) falls within Section 1101(a)(43)(A). Resp. Br. 36. But even if a multi-jurisdictional survey and the other interpretive tools just discussed did not clearly dictate the outcome here, there would still be no basis for applying *Chevron* deference.

A. Lack of Ambiguity

The Government acknowledges that many tools for resolving ambiguity in statutes precede *Chevron* deference. Resp. Br. 42. And this Court has stated that "the rule of lenity" is one such tool for deeming a statute "unambiguous" for *Chevron* purposes. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). Yet the Government says neither the canon requiring ambiguities in deportation cases to be resolved in favor of the noncitizen nor the criminal rule of lenity applies here. The Government is incorrect on both scores.

1. According to the Government, this Court has held the requirement to resolve statutory ambiguities against deportation is a canon that "must come only *after*" *Chevron* deference. Resp. Br. 43-44. But

Judulang v. Holder, 565 U.S. 42 (2011), does not stand for that proposition. *Judulang* did not involve *Chevron* or even the "interpretation of any statutory language." *Id.* at 52 n.7. And deportation was not at issue in either of the other cases the Government references. *Negusie v. Holder*, 555 U.S. 511 (2009), involved asylum. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), involved immigrant visas.

While the BIA's constructions of ambiguous statutes may well be entitled to deference when deportation is *not* at stake, there is a "longstanding principle" of construing ambiguities in the small slice of cases involving "deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Accepting the Government's "order-of-operations" argument (Resp. Br. 42-43) would eviscerate that principle. Instead of being required to guarantee fair notice to account for the "drastic measure" at stake, *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)), the BIA would always be free to adopt the harshest of all "reasonable" interpretations of statutes setting grounds for automatic deportation. That would be neither fair nor true to precedent.

2. The Government's arguments for applying *Chevron* instead of the criminal rule of lenity here fare no better.

a. The Government first maintains that applying the rule of lenity where a statute has both criminal and civil applications would "run[] headlong into this Court's precedents." Resp. Br. 48. But the Government ignores that in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S.

687 (1995), and *United States v. O'Hagan*, 521 U.S. 642 (1997), Congress had made it a crime to violate the regulations at issue. *See* 16 U.S.C. § 1540(b)(1) (*Babbitt*); 15 U.S.C. § 78n(e) (*O'Hagan*). Thus, those cases posed no separation of powers concern. *See* Pet. Br. 44. Nor did they present any serious notice problem, for the regulations had been on the books for many years. *See Babbitt*, 515 U.S. at 704 n.18 (20 years); *O'Hagan*, 521 U.S. at 668 (17 years).

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011), is even further afield. The Court proceeded there from the premise that "the statute requires fair notice" and held, without invoking *Chevron*, that it did. *Id.* at 14.

By contrast, the Government acknowledges that in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the Court applied the rule of lenity "to a tax statute in a civil setting" because it had criminal applications. Resp. Br. 49 n.42. This Court has done so in other cases involving hybrid statutes as well. *See* Amicus Br. of NACDL 10-11 (collecting cases); *United States v. Santos*, 553 U.S. 507, 521-23 (2008) (plurality opinion). Therefore, insofar as precedent governs this issue, *Chevron* deference is off-limits.

b. Even setting precedent aside, the Government's position is untenable. Although the Government never squarely chooses, its position must amount to one of two things. First, it could be that Section 1101(a)(43)(A)—and, indeed, any hybrid statute—can mean one thing in immigration cases and something different in criminal cases. *See* BIO 10-11 & 20 n.2. But that would violate the principle that statutes cannot be "chameleons." *Clark v.*

Martinez, 543 U.S. 371, 382 (2005); Petr. Br. 42 (citing other case law). Second, the Government could think that any reasonable BIA construction of an ambiguous hybrid statute must control in criminal, as well as immigration, cases. But that would violate the separation of powers and create fair-notice problems. Petr. Br. 42-43; *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-57 (10th Cir. 2016) (Gorsuch, J., concurring) (endorsing this view).

None of the Government's attempts to get out of this bind has merit. The Government suggests that the rule of lenity may not apply to Section 1101(a)(43)(A)'s criminal applications because they are merely sentencing enhancements, relevant "only to defendants whose conduct violates additional legal requirements." Resp. Br. 46. But this Court has made clear that the rule of lenity "applies to sentencing as well as substantive provisions" of criminal law. *United States v. Batchelder*, 442 U.S. 114, 121 (1979); *accord United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion); *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

The Government also urges this Court to shun the rule of lenity here because Section 1101(a)(43) is implicated more often in immigration cases than in criminal cases. Resp. Br. 47. But the comparative rate at which a hybrid statute is invoked in civil versus criminal proceedings has nothing to do with the legal reasons why the rule of lenity must govern any ambiguities in such statutes. At any rate, the Government admits that Section 1101(a)(43)(A) is "frequent[ly]" invoked in illegal reentry prosecutions. Resp. Br. 47. That is an understatement. Illegal reentry is "the most frequent recorded lead charge" in

federal criminal cases, and "more than 40 percent" of those prosecuted face an enhancement for having a predicate "aggravated felony" conviction.[5]

Finally, the Government notes that some hybrid provisions of the INA concern "terrorism-related grounds of inadmissibility." Resp. Br. 53. This Court should not be cowed by this reference. Many federal statutes relating to national security matters apply *only* in the criminal realm. *See, e.g., United States v. Ressam*, 553 U.S. 272 (2008). The rule of lenity does not prevent the Government from effectively enforcing those laws; the Government just has to construe the laws correctly. *Id.* at 274. So too here.

B. Unreasonableness of the BIA's Analysis

Even if Section 1101(a)(43)(A) were ambiguous within the meaning of *Chevron*, the BIA's decision here would still not warrant deference because it is unreasonable. Indeed, the Government hardly defends the BIA's analysis against petitioner's three main critiques.

1. The Government cannot deny that the BIA improperly focused on a hypothetical of the *worst* conduct Cal. Penal Code § 261.5(c) could cover rather than the *least* of the acts criminalized. Petr. Br. 46-47. The Government's only response is that this error relates only to "whether the state offense falls under

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[5] Transactional Records Access Clearinghouse, *Prosecutions for December 2016*, http://trac.syr.edu/tracreports/bulletins/overall/monthlydec16/fil; U.S. Sentencing Comm'n, *Illegal Reentry Offenses*, at 9 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

the federal provision at issue," not to how to construe the federal provision in the first place. Resp. Br. 54. But, as explained above (at 3-6), these two inquiries need not be hermetically sealed off from one another, and the BIA itself did not do so, *see* Pet. App. 34a.

2. An agency acts unreasonably if it ignores critical information and instead "relie[s] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The BIA here did just that. It improperly ignored that a nationwide consensus dictates that consensual sex can constitute "abuse" solely because of the partners' ages only when the younger partner is under 16. *See supra* 7-12. The BIA also concluded that the definition in 18 U.S.C. § 3509 of "sexual abuse" for purposes of child testimony was more relevant than the federal statute (Section 2243) criminalizing "sexual abuse of a minor." Pet. App. 29a-30a. The Government never references Section 3509 in its analysis of Section 1101(a)(43)(A), nor does it defend the BIA's determination that Section 3509 is more instructive than Section 2243.

3. The Government says the BIA did not need to construe any ambiguity in Section 1101(a)(43)(A) in favor of the noncitizen because "[t]he Board . . . did not find" any ambiguity requiring it "to guess as to what Congress intended." Resp. Br. 55 (internal quotation marks and citation omitted). But there is no better evidence that the BIA was indeed forced "to guess at what Congress intended" than the fact that it was desperate enough to consult sources as far flung as an article regarding HIV prevention in a 20-year-old family planning journal to assess whether

convictions under Cal. Penal Code § 261.5(c) constitute "sexual abuse of a minor." Pet. App. 35a-36a. If nothing else, that perceived indeterminacy of the federal deportation statute at issue should have precluded the BIA from ruling against petitioner.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 15, 2017